

¹ The Board notes that during the pendency of this appeal, OWCP's Branch of Hearings and Review issued a March 14, 2019 decision which denied appellant's request for a hearing on the same issue addressed in the September 20, 2018 nonmerit decision currently on appeal. OWCP's March 14, 2019 decision is null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s) in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see e.g., M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 20, 2017 appellant, then a 42-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that he developed mental stress due to factors of his federal employment. He attributed his condition to being removed from his post, being informed that he was under investigation, and never being informed of the reason for or the type of investigation. Appellant first became aware of his emotional condition and first attributed his condition to factors of his federal employment on September 16, 2016.

In his narrative statement, appellant alleged that he was removed from his B-North post and was accused of bringing a cell phone into the employing establishment. He alleged that he was also found to be absent without leave in August 2015 when he was involved in a motor vehicle accident. The investigation was closed on January 5, 2017, but the employing establishment refused to explain why appellant was moved. Appellant did not believe that he should return to work inside the employing establishment as he was afraid that he would be "set up" by management, as he believes they are sabotaging his career. He noted that he had taken advantage of the Employee Assistance Program and was taking medication due to his employment.

On November 6, 2017 James F. Jacobs, Ph.D., a licensed marriage and family counselor, diagnosed generalized anxiety disorder and depressive disorder. He noted that appellant attributed his condition to an unsafe work environment.

In a November 17, 2017 development letter, OWCP advised appellant of the deficiencies in his claim. It requested additional factual and medical evidence from him and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On December 13, 2017 Dr. John Clay, a Board-certified family practitioner, diagnosed generalized anxiety disorder as well as major depressive disorder.

By decision dated March 27, 2018, OWCP denied appellant's emotional condition claim finding that the evidence submitted was insufficient to establish a compensable factor of employment. It noted that the incidents alleged were administrative actions of the employing

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the September 20, 2018 decision, and on appeal, appellant submitted additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

establishment without a showing of error or abuse. OWCP concluded, therefore, that the requirements had not been met to establish that “an emotional condition that arose during the course of employment and within the scope of compensable work factors” as defined by FECA.

On August 28, 2019 appellant requested reconsideration of the March 27, 2018 decision. In support of this request, he resubmitted Mr. Jacob’s November 16 and December 7, 2017 notes. Appellant also resubmitted Dr. Clay’s December 13, 2017 note.

Appellant provided a report dated July 20, 2018 from Dr. Curtis R. Bryan, a Board-certified psychiatrist, diagnosing major depressive episode with anxious distress. Dr. Bryan found that appellant was currently not fit for duty. Appellant also submitted an October 27, 2017 injury or illness incident report on which he reported that he was working his assigned post at B-North when he was pulled from his assigned post by the employing establishment, was advised by the employing establishment that he was under investigation, but was never informed of the reason for the investigation. He alleged that he had developed mental stress due to these actions of the employing establishment.

By decision dated September 20, 2018, OWCP denied appellant’s request for reconsideration pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶

Upon receipt of a timely application, OWCP exercises its discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

⁴ *Supra* note 1 at 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ C.C., Docket No. 18-0316 (issued March 14, 2019); 20 C.F.R. § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's timely August 28, 2019 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With the August 28, 2019 reconsideration request, appellant provided Dr. Bryan's July 20, 2018 medical report. This report fails to address the underlying merit issue of whether appellant implicated and substantiated a compensable factor of employment as necessary to establish an emotional condition in the performance of duty. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

The Board notes that the November 6 and December 7 and 13, 2017 reports were previously considered by OWCP. Additionally, the October 27, 2017 injury or illness incident report duplicated statements from appellant already addressed in the prior decision. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰

Because appellant's request for reconsideration did not include relevant and pertinent new evidence not previously considered he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹¹

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Id.* at § 10.608(b).

⁹ *M.B.*, Docket No. 17-1980 (issued May 14, 2019); *E.G.*, Docket No. 18-0270 (issued August 24, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁰ *M.B.*, *id.*; *D.K.*, 59 ECAB 141 (2007).

¹¹ 20 C.F.R. § 10.606(b)(3)(iii); *see D.P.*, Docket No. 17-0290 (issued May 14, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board